

SUPREME COURT

Supreme Court of the United States

OCTOBER TERM, 1954.

No. ~~106~~ 23

HARRY SLOCHOWER,

Appellant,

against

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

(a) Reports of the Opinions in the courts below.

This case was instituted by petition to the Supreme Court of the State of New York, Kings County. The petition was dismissed, and the opinion of the court is reported in 202 Misc. 915, 118 N. Y. Supp. 2d, 487.

Appellant appealed to the Appellate Division of the Supreme Court of the State of New York from the order dismissing the petition, and the Appellate Division (two of the five justices dissenting) affirmed the order dismissing the petition. The opinions of the Appellate Division are reported in 382 App. Div. 717, 718, 122 N. Y. Supp. 2d, 286, 905.

An appeal from the order of affirmance was taken to the Court of Appeals of the State of New York. The Court of Appeals (three of seven Judges dissenting) affirmed the order of the Appellate Division. The opinions of the Court of Appeals are reported in 306 N. Y. 532, 119 N. E. 2d 373.

A motion for amendment of the remittitur or in the alternative, for leave to reargue, was made to the Court of Appeals of the State of New York. Leave to reargue was denied, and the motion of the Appellant Slochower to amend the remittitur was granted. The opinion of the Court of Appeals denying leave to reargue and amending the remittitur with respect to the Appellant Slochower, is reported in 307 N. Y. 806, 121 N. E. 2d 629.

(b) The Grounds on which Jurisdiction of the Supreme Court of the United States is invoked.

(i) The proceeding was instituted to review and annul the Appellee's order or directive discharging appellant and terminating his employment as Associate Professor at Brooklyn College. The Appellant was discharged without notice or hearing because of his refusal, when questioned on September 25, 1952, by a sub-committee of the Committee on the Judiciary of the United States Senate, to state whether he had been a member of the Communist Party in 1940 and 1941. Appellant refused to answer the question on the ground that his answer might tend to incriminate him.

The proceeding was brought pursuant to Article 78 of the Civil Practice Act of the State of New York, relating to causes in the nature of mandamus and certiorari proceedings.

(ii) The decree sought to be reviewed was made by the Court of Appeals of the State of New York on April 22, 1954, and was entered April 23, 1954. An order of the Court of Appeals denying leave to reargue was made July

14, 1954. The Notice of Appeal to the Supreme Court of the United States was filed October 5, 1954, in the Supreme Court of the State of New York, Kings County.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are: *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934); *McCollum v. Board of Education*, 333 U. S. 203 (1948); *Wieman v. Updegraff*, 344 U. S. 183 (1952); *Adams v. Maryland*, 347 U. S. 179 (1954).

(v) The validity of Section 903 of the New York City Charter is involved. The text of the statute follows:

NEW YORK CITY CHARTER, §903

Failure to testify

§903. If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

The section may be found in The New York City Charter and The Administrative Code of The City of New York, p: 137 (Williams Press, 1943).

(c) The Questions presented by the Appeal.

(1) Whether §903 of the New York City Charter, in providing for discharge from employment and ineligibility for future employment of any New York City employee who refuses to testify against himself in a Federal proceeding, abridges an immunity of citizens of the United States, in violation of the Fourteenth Amendment.

(2) Whether §903 of the New York City Charter, in providing for discharge from employment and ineligibility for future employment by the City of New York, of any employee who invokes the Fifth Amendment right to refuse to incriminate himself, contravenes the due process clause of the Fourteenth Amendment.

(3) Whether §903 of the New York City Charter, is an *ex post facto* Law.

(d) The Material Facts of the Case.

The Appellant, Harry Slochower, was an Associate Professor of Literature and of German at Brooklyn College, one of the colleges of the New York City public school system. The college is governed by the Appellee, the Board of Higher Education of the City of New York.

On September 24, 1952, Appellant appeared pursuant to subpoena and testified before a sub-committee of the U. S. Senate Committee on the Judiciary. When asked whether he had been a member of the Communist Party eleven or twelve years before the inquiry, in 1940 or 1941, he declined to answer on the ground that his answer might tend to incriminate him. However, Appellant did state

that he had not been a member of the Communist Party after 1941, and that he had publicly expressed opinions in opposition to communist doctrine.

On October 6th, the Appellant was summarily dismissed from his position as a college professor. He was dismissed pursuant to Section 903, without notice or hearing, though he had been a college teacher for twenty-seven years and had tenure under New York Education Law §6206. The only reason given for Appellant's discharge was that he had refused to answer the questions referred to on the ground of self-incrimination. It was not claimed that Appellant had been guilty of any misconduct in any classroom, or that his work was in any way unsatisfactory. Indeed, the contrary was true, for the Appellant is widely known as a scholar, lecturer, author and literary critic, and has received the Bollingen Award, and a Guggenheim Fellowship.

The following federal questions sought to be reviewed were raised in Appellant's petition by which the proceedings were initiated:

(1) Whether the action taken by the Appellee, pursuant to §903 of the New York City Charter, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States (fols. 58, 127*).

(2) Whether the action taken by the Appellee pursuant to Section 903 deprived Appellant of rights, and of the equal protection of the laws, guaranteed by the Fourteenth Amendment to the United States Constitution (fols. 58, 127).

The Federal questions sought to be reviewed were also raised in the Appellant's arguments and briefs in the

*Folio references are to the numbered folios of the papers on appeal to the Court of Appeals of the State of New York.

Appellate Division and the Court of Appeals of the State of New York.

The courts passed upon the questions raised by upholding the validity of the statutes. The Court of Appeals of the State of New York, in its supplemental opinion made the following references to the Federal questions raised by Appellant:

"Questions under the Federal Constitution were presented and passed upon by the Court of Appeals, viz., whether the rights of petitioner-appellant Slochower to due process under the Fourteenth Amendment to the Federal Constitution were violated by the construction and application herein of New York City Charter (§903), in that petitioner-appellant Slochower claims: (1) that the automatic operation of section 903 deprives him of tenure and of a trial to which he was entitled; (2) that the congressional subcommittee was not empowered to consider and specifically stated that its questions would not be directed to official conduct of city employees and that petitioner-appellant Slochower, therefore, could not have known at the time of the inquiry that the questions asked of him and which he refused to answer related to his official conduct, and (3) that at the time of the inquiry, there had been no determination under the Feinberg Law that the Communist Party was a 'subversive' organization, so that membership therein would affect a teacher's eligibility and that the retroactive application of that determination is constitutionally prohibited. The Court of Appeals held that petitioner-appellant Slochower was not denied due process under the Fourteenth Amendment" (307 N. Y. 806-807).

The majority opinion in the Appellate Division of the State of New York made the following reference to the Federal question:

The charter provision does not abridge the constitutional privilege against self-incrimination (*Canteline v. McClellan*, 282 N. Y. 166; *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216) (fols. 714-715).

(e) The Federal Questions are Substantial.

(1) *The Statute Abridges an Immunity of Citizens of the United States.*

The law under consideration, as construed by the highest court of the state, provides for the discharge of any city employee who exercises the right to refuse to testify against himself in a Federal proceeding. It provides further that any person exercising the Federal Constitutional right shall not be eligible for further employment by the city or its agencies.

The Fourteenth Amendment to the Constitution prohibits any state from abridging the privileges and immunities of citizens of the United States. The right to refuse, when interrogated by a United States Senate Committee, to answer self-incriminating questions, is guaranteed by the Fifth Amendment to the Constitution. *Adams v. Maryland*, 347 U. S. 179 (1954). A law requiring one who exercises that right to surrender his means of livelihood is an abridgment, if not a denial, of the right.

The precise question here presented has not been passed upon by this court. In *Adamson v. California*, 332 U. S. 46 (1947) and in *Twining v. New Jersey*, 211 U. S. 78 (1908) this Court distinguished between the right of a citizen of a state, to refuse to testify against himself in a state proceeding, and the right of a citizen of the United States to refuse to incriminate himself in a Federal proceeding. It was held in the *Adamson* and *Twining* cases that the Constitution did not protect the former right against state invasion. The right to refuse to incriminate one's self in a Federal

proceeding, however, may not be limited by state action. *Adams v. Maryland*, 347 U. S. 179 (1954); and it is with that right that we are here concerned. See also *Rochin v. California*, 342 U. S. 165, 174, 177 (1952) (concurring opinions).

(2) *The Enforcement of the Statute Violated the Due Process Clause of the Fourteenth Amendment.*

Whether a public servant has a right to employment by a government agency, or whether such employment is considered a privilege, the right or privilege may not be arbitrarily withheld or terminated. The arbitrary exclusion of a civil servant from state employment contravenes the due process clause of the Fourteenth Amendment. *Wieman v. Updegraff*, 344 U. S. 183 (1952).

The statutory requirement that one surrender a Federal Constitutional right, as a condition to employment by the government, or as a condition to the enjoyment of a privilege conferred by the state, is an arbitrary assertion of power and a denial of due process. *Fröst v. R. R. Com.*, 271 U. S. 583, 593 (1926); *Alston v. School Board of City of Norfolk*, 112 Fed. 2d, 992, 997 (1940); *Matter of Peck v. Cargill*, 167 N. Y. 391, 395 (1901).

In *Orloff v. Willoughby*, 345 U. S. 83 (1953) this Court held that one who refused to testify against himself could not complain if, for that reason, he was thereafter denied an army commission to which he had no claim. The Court stated, however, that no one may be punished for asserting the constitutional right (345 U. S. 83, 91, 97).

Section 903 imposes a punishment for exercising the constitutional right, for discharge and permanent disqualification from public employment is a punishment of "a most severe type." *United States v. Bovett*, 328 U. S. 303, at p. 316 (1946); *Cummings v. Missouri*, 4 Wall. 277 (1866).

(3) *The Statute Under Consideration Violates Article I Section 10 of the Constitution.*

In *United States v. Lovett*, 328 U. S. 303, 316 (1946), this Court held:

"No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule'. The Constitution declares that that cannot be done either by a State or by the United States." 328 U. S. 303, 316. (Emphasis supplied.)

The statute here challenged accomplished the very result condemned in the *Lovett* case, *supra*. Section 903 of the New York City Charter provides for the dismissal of a city employee who refuses to answer questions relating to his "official conduct." The political affiliation, and certainly past affiliation, of an employee has no connection with his official duties or conduct. The duties and tenure of New York civil service employees may not be affected or influenced by their political opinions or affiliations. New York Civil Service Law §25; *People ex rel. Garvey v. Prendergast*, 148 App. Div. 129, 133. In fact it is a penal offense for a superior to inquire into the political connection of an employee in the civil service. New York Civil Service Law §26a.

The court below held membership in the Communist Party a matter relating to Appellant's "official conduct"

because the Communist Party had been found to be a conspiracy against the government "and loyalty to our government goes to the very heart of official conduct" (306 N. Y. 532, 540-541). But the questions put to the Appellant did not relate to the party held to be a disloyal conspiracy. The questions that Appellant refused to answer related to membership in 1940 and 1941. As the indictment charged in *United States v. Dennis*, 341 U. S. 494 (1951), the defendants in that case brought about the dissolution of the Communist Political Association after April 1945, and organized in its place the present Communist Party. It was determined in the *Dennis* case, *supra*, that the purpose and aim of the *new* party, and not its predecessor, was the destruction of the government by violence (341 U. S. at p. 517).

The court below also found past membership in the Communist Party a matter relating to "official conduct" and therefore within the comprehension of Section 903, because of the provisions of New York Education Law §3022 (the Feinberg Law) (306 N. Y. 532, 540-541). That law, implementing Civil Service Law §12-a, provides for the dismissal of any public school teacher who is a member of a subversive group advocating the overthrow of the government by unlawful means. By its terms no group is affected by the Feinberg Law until the group is determined to be subversive by the Board of Regents, Education Law §3022(2).

It was not until September 24, 1953, that the Board of Regents determined the Communist Party to be a "subversive" organization within the meaning of the Feinberg Law and §12-a of the Civil Service Law (New York Times, September 25, 1953, p. 1). The determination, effective the date of its announcement, was made one year after the

Appellant was questioned, and more than eleven months after he was dismissed.

Thus Appellant was dismissed pursuant to Section 903, and "sentenced to perpetual exclusion" from employment by the City and its agencies, for an act brought within the definition of the statute eleven months after his dismissal.

December 2, 1954.

Respectfully submitted,

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APPENDIX.

OPINION OF COURT OF APPEALS

In the Matter of MARY I. DASIMAN *et al.*, Appellants,
against BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Respondent.

In the Matter of VERA SHLAKMAN *et al.*, Appellants,
against BOARD OF HIGHER EDUCATION OF THE CITY OF
NEW YORK, Respondent.

APPEAL, in each of the above-entitled proceedings, from orders of the Appellate Division of the Supreme Court in the second judicial department, entered June 15, 1953, which affirmed, by a divided court, orders of the Supreme Court at Special Term (F. E. JOHNSON, J.), entered in Kings County, denying an application under article 7A of the Civil Practice Act for an order directing respondent, constituting the board of education of the City of New York in the first proceeding, and the board of higher education of the City of New York in the second proceeding, to annul the dismissal of petitioners from their positions as teachers and to reinstate them without prejudice.

CONWAY, J. Petitioners who are teachers—the first group in public schools, the second group in public colleges—were subpoenaed and appeared in September and October of 1952 before Senator Homer Ferguson, sitting in New York as a subcommittee of the Committee on the Judiciary of the Senate of the United States to investigate the administration of the Internal Security Act¹ and other internal security laws.

Among other questions each of the petitioners was asked whether he or she was presently or had ever been a member of the Communist party. Each of them refused to answer, basing the refusal upon the privilege against self incrimination granted by the Fifth Amendment to the United States Constitution.

¹ See 8 U. S. C. A., §1182.

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The board of education and the board of higher education received certified copies of the transcript of the minutes of the hearing. Each of these boards was advised by the corporation counsel of the City of New York that the refusal to answer questions on the only ground which was sustained, viz., the privilege granted by the Fifth Amendment, constituted a refusal to answer the respective questions on the ground that the answer would tend to incriminate within the meaning of section 903 of the New York City Charter and that questions directed to employees of the boards concerning past or present membership in the Communist party constituted an inquiry into the employees' official conduct within the purview of the same section. Thereupon, the boards adopted resolutions terminating the employment of petitioners and declaring their positions vacant pursuant to the provisions of section 903. There is no claim by petitioners that their refusal to answer the questions based upon the privilege granted them by the Fifth Amendment does not constitute a refusal to answer upon the ground that the answer would tend to incriminate them within the meaning of Charter section 903, but only that the section, for various reasons to be discussed, is not applicable.

In this proceeding we are required to and do accept as truthful petitioners' assertion that answers to the questions propounded might have tended to incriminate them since that is the only reason that persons questioned by a congressional committee concerning their affiliation with the Communist party are entitled to invoke the protection of the Fifth Amendment to the United States Constitution (see *Blau v. United States*, 340 U. S. 159). Similarly, we do not presume, of course, that these petitioners by their action have shown cause to be discharged under the Feinberg Law (L. 1949, ch. 360) since no inference of membership in the Communist party may be drawn from the assertion of one's privilege against self incrimination.

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Section 903 reads: "If any councilman or other officer or *employee* of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, *any legislative committee, or any officer, board or body* authorized to conduct *any* hearing or inquiry, *or having appeared shall refuse to testify or to answer any question* regarding the property, government or affairs of the city or of any county included within its territorial limits, *or regarding* the nomination, election, appointment or *official conduct* of any officer or *employee* of the city or of any such county, *on the ground that his answer would tend to incriminate him*, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency." (Emphasis supplied.)

Section 903 is inoperative if the teacher gives either an affirmative or negative answer to the question posed—even though the answer be false. The effect of the answer on the teacher's fitness to continue teaching is for the board of education or of higher education, and those bodies only, to say. Section 903 becomes applicable only if the teacher witness refuses to answer upon the ground that the answer would tend to incriminate him or her. The teacher alone possesses the power to bring the statute into play. The assertion of the privilege against self-incrimination is equivalent to a resignation (*Matter of Koral v. Board of Educ. of City of N. Y.*, 197 Misc. 221). As the Supreme Court said in *Adler v. Board of Educ.* (342 U. S. 485, 492, affg. *sub nom. Thompson v. Wallin*, 301 N. Y. 476): "It is equally clear that they [teachers] have no right to work for the state in the school system on their own terms. [Case cited.] They may work for the school system upon the reasonable terms laid down by the proper authorities

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of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." And, many years ago Justice HOLMES in *McAuliffe v. New Bedford* (155 Mass. 216, 220) said similarly: "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

There is nothing novel about such a statute. Other statutes provide for the vacatur of, or forfeiture of, an office or employment upon the happening of an event specified therein. (See, e.g., Greater New York Charter, §1549, now New York City Charter, §895; *Matter of Hulbert v. Craig*, 124 Misc. 273, affd. 213 App. Div. 865, affd. 241 N. Y. 525; *Melzger v. Swift*, 231 App. Div. 598, affd. 258 N. Y. 440; Public Officers Law, §30; *Matter of Buhler*, 43 Misc. 140; *Ginsberg v. City of Long Beach*, 286 N. Y. 400.) The people have similarly provided in our State Constitution as to all public officers who refuse to sign waivers of immunity under certain circumstances (Art. 1, §6, and see *Cantelino v. McClellan*, 282 N. Y. 166, and cases cited therein).

There is no conflict between section 903 of the Charter and equally valid though differing procedures under the Feinberg Law (L. 1949, ch. 360) and under sections 2554, 2573 and 6206 of the Education Law which guarantee to teachers the right to hold their respective positions during good behavior and efficient and competent service and not to be removed except for cause after a hearing by the affirmative vote of a majority of the board. Section 903 of the Charter, the Feinberg Law and sections 2554, 2573

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and 6206 of the Education Law are legislative enactments of equal dignity. The sections in the Education Law govern the removal of teachers for cause generally by the board of education and not by the city, whereas the Charter section declares that there shall be a vacatur of office or employment for a particular cause. It merely imposes a condition upon public employment. The legislative acts are to be read in harmony and it is not within our judicial competence to decide for the Legislature, the board of education or the City of New York which shall be used.

Following the adoption of the resolutions of the boards terminating the employment of petitioners, they commenced these two article 78 proceedings. Special Term concluded that section 903 applied and had been violated by petitioners. The petitions were dismissed. 202 Misc. 915. The Appellate Division, Second Department, affirmed, two Justices dissenting. 282 App. Div. 717, 718. The majority held that teachers in New York City public schools and colleges are city employees within the meaning of Charter section 903; that the Charter section is applicable to a hearing before a Federal legislative committee; that an inquiry into past or present membership in the Communist party is an inquiry regarding official conduct of a city officer or employee; that such inquiry is not barred by the provisions of sections 25 and 26-a of the Civil Service Law; that the Charter is not a local law within the meaning of section 2 of the City Home Rule Law and that the Charter provisions do not abridge the constitutional privilege against self incrimination. The dissenting Justices agreed with the majority that section 903 is applicable to a hearing before a Federal legislative committee; that an inquiry into past or present membership in the Communist party is an inquiry regarding official conduct of a city officer or employee and that the Charter is not a local law within the meaning of the City Home Rule Law. They were at variance however, with the conclusion of the majority that petitioners were employees of the City of New York within the meaning of section 903.

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In this court we are all agreed that the Communist party is a continuing conspiracy against our Government. (See, *Communications Assn. v. Douds*, 339 U. S. 382, 425 *et seq.*; *Dennis v. United States*, 341 U. S. 494, 564; Preamble to the Feinberg Law (L. 1949, ch. 360, §1).) We are also all in agreement that an inquiry into past or present membership in the Communist party is an inquiry regarding the official conduct of an officer or employee of the City of New York. Loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government. (See N. Y. Const., art. XIII, §1; Education Law, §3002; Civil Service Law, §§12a, 30; L. 1951, ch. 233, §§1, 8.) Communism is opposed to such loyalty. (*Communications Assn. v. Douds*, 339 U. S. 382, 425 *et seq.*, *supra*; *Dennis v. United States*, 341 U. S. 494, 564, *supra*.) Internal security affects local as well as National Governments.

We are in disagreement in this court only as to two questions. They are (a) whether the Charter section is applicable to a hearing before a Federal legislative committee and (b) whether the petitioners are employees of the City of New York. All of the six Justices below were in accord in answering (a) in the affirmative.

As to (a), we, the majority, agree with all of the Justices below that section 903 is applicable to a hearing before a Federal legislative committee. The language in section 903 is: "*any* legislative committee, or *any* officer, board or body authorized to conduct *any* hearing or inquiry * * *." We cannot say that that language excepted a legislative committee of our National Government for we read "*any*" to mean "*any*".

As to (b), when the Legislature adopted the Charter of the City of New York and the Administrative Code it declared that it intended "to provide an administrative code for the city of New York harmonizing with the provisions of the New York city charter" (Administrative Code, §982-1.0) and directed that the code was to be "construed liberally". (Administrative Code, §982-2.0.) In

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section 981-1.0 of the Administrative Code the Legislature defined an employee as "Any person whose salary in whole or in part is paid out of the city treasury". This language cannot be misread. Petitioners are paid by check signed by the city treasurer with funds from the city treasury.

The Education Law (§§2553, 6201) empowers the Mayor of the City of New York to appoint the members of the board of education and to appoint and remove the members of the board of higher education. The City Charter (§522) requires the board of education to submit an annual written report to the Mayor. The Education Law (§§2576, 6202) requires both boards to submit to the board of estimate expense budget estimates, just as city departments do; (See, also, New York City Charter, §895); counsel for the city is their counsel (New York City Charter, §394, subd. a; *Matter of Kay v. Board of Higher Educ. of City of N. Y.*, 260 App. Div. 9, motion for leave to appeal denied 285 N. Y. 859); the boards of education and higher education are before us asserting, not denying, the applicability of section 903 of the City Charter and section 982-1.0 of the Administrative Code to them and the petitioner teachers. We have, in many cases involving teachers, written that in matters *strictly* educational or pedagogic a board of education is not a department of the city government, but an independent public body; that public education is a State and not a municipal function and that it is the policy of the State to separate matters of public education from the control of municipal government. (*Matter of Hirshfield v. Cook*, 227 N. Y. 297, 301; *Matter of Divisich v. Marshall*, 281 N. Y. 170; *Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 208; *Gunnison v. Board of Educ. of City of N. Y.*, 176 N. Y. 11.) We have in so doing, however, been careful to point out, as already indicated, in *Matter of Hirshfield v. Cook* (*supra*) that: "If the state through its legislature intends to make the board of education of the city wholly independent of municipal action and prevent the city or the officers and boards thereof from asserting any authority

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relating to matters connected with the public schools and the determination of the expenditures therefor, it should be stated by it in such clear language that its intention is 'unmistakable' " (pp. 309-310) and that: "while the educational affairs in each city are under the general management and control of the board of education, such board is subject to municipal control in matters not *strictly* educational or pedagogic." (P. 304; emphasis supplied.) Thus, board of education employment must be added to other municipally paid service in determining seniority rights under section 31 of the Civil Service Law. (*Matter of Schaefer v. Rathmann*, 237 App. Div. 491, 494-495, affd. 262 N. Y. 492); employees of the board of education are employees of the city under section 896 of the New York City Charter making it a crime to conspire to defraud the city (*People v. Engel*, 200 Misc. 60); the offices of trustee of Hunter College of the City of New York and of members of the board of higher education are offices "connected with the government of the City of New York" within the meaning of section 1549 of the Greater New York Charter (now New York City Charter, §895) which prohibits dual office holding by city officers. (*Metzger v. Swift*, 258 N. Y. 440, *supra*, see, also, Education Law, §§2554, 2573, 6206; New York City Charter, §896.)

The State has the power to determine what shall constitute a vacatur of public office or employment and, in enacting statutes, to *define* the terms used therein as in its wisdom it sees fit. Thus, it may define who are employees of the City of New York and we must accept the legislative definition as binding upon us. (*Matter of Bronson*, 150 N. Y. 1; McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.], §75; *People ex rel. Champlin v. Gray*, 185 N. Y. 496, 200.) It has made the *source* of the compensation the determinant factor.

Petitioners are in reality asking us to take the words used to frame concepts affecting the administration of education in matters strictly educational and pedagogic

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and to enlarge and expand their meaning so as to include something which transcends matters that are strictly educational and pedagogic, on the one hand, and then rewrite the Administrative Code (§981-1.0, subd. 7) so that the words "Any person whose salary in whole or in part is paid out of the city treasury" as used to define an employee of the city shall not mean that teachers are employees of the city, although their salaries are paid by check of the city treasurer from the city treasury. This we may not do but must take clear, simple and unambiguous words of the Legislature as we find them. (*Meltzer v. Koenigsberg*, 302 N. Y. 523, 525; *Matter of Rathscheck*, 300 N. Y. 346, 350, 353; *Matter of Tishman v. Sprague*, 293 N. Y. 42, 50.)

Finally, it is urged that at the time the Charter was approved and when it became effective in 1938, the Legislature did not have in mind the specific purpose for which section 903 is now being used. Whether or not that be true is doubtful indeed since the Supreme Court of the United States has upheld the deportation of legally resident aliens because of membership in the Communist party for periods between 1925 and 1939 in *Harisiades v. Shaughnessy* (342 U. S. 580). Section 903 became effective January 1, 1938. But even if it were to be accepted as true it would be of little moment here. More than fifty years ago in *Hudson Riv. Tel. Co. v. Watervliet Turnpike & Ry. Co.* (135 N. Y. 393, 403-404), we said: "The words of the statute are to be interpreted according to their natural and obvious meaning, and, as the terms employed are not ambiguous, extrinsic facts are not available to restrict the authority which it plainly confers. The language, literally construed, includes undiscovered, as well as existing modes of operation. . . . It would be an unjust reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future." And only recently in *Matter of Di Brizzi (Proskauer)* (303 N. Y. 206 [1951]), this court

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upheld the use of a statute (Executive Law, §62, subd. 8, now §63, subd. 8) to permit the creation of a "New York State Crime Commission", which was originally enacted a few weeks after our entry into World War I as a "Peace and Safety Act" (L. 1917, ch. 595) for the purpose of dealing with wartime sabotage, espionage and subversive activities of enemy agents and sympathizers, and the repeal of which the Attorney-General of the State had recommended to the Legislature because it was "suited to war conditions". (1918 Atty.-Gen. 16.) And so, here, section 903 protects the people of the city and the State's chartered municipalities from dangers encompassed by the language of the statute, even though the precise danger may not have been envisioned at the moment of passage.

The orders appealed from should be affirmed, without costs.

DESMOND, J. (dissenting). That communism in the United States is a conspiracy against our Government, and that participation in such a conspiracy is entirely inconsistent with the loyalty required from a school teacher, are undisputed propositions which do not decide this case. Our duty, on this appeal, as on any other, is to apply the laws of this State as we find them, to communists, noncommunists, and everyone else. No purpose, however high or urgent, suspends the salutary rule that "statutes, directed against known and stated evils, are not to be stretched to cover situations having no real or reasonable relation to those evils (see McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.], §§95, 141, 146, and cases cited; also *Kauffman & Sons Saddlery Co. v. Miller*, 298 N. Y. 38, 44, 45, and *Matter of Breen v. New York Fire Dept. Pension Fund*, 299 N. Y. 8, 19)" (*Metropolitan Life Ins. Co. v. Durkin*, 301 N. Y. 376, 381). If more or different statutes are needed to rid the schools of communist teachers, it is for the Legislature to enact them, and the New York State Legislature has shown no reluctance to do so, nor has this court hesitated to enforce them (see the "Feinberg Law",

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Education Law, §3022, as construed in *Thompson v. Wallin*, 301 N. Y. 476; *Matter of Adler v. Wilson*, 282 App. Div. 418, motion for leave to appeal denied 306 N. Y. 979). Ours is the judicial task, limited by judicial powers, of interpreting and applying section 903 of the New York City Charter as enacted in 1938. We find nothing in that section's language, history or known purposes to justify using it, as it is being used here, as authority for ousting public school teachers, employed by respondent board of education, because of their refusals to answer questions put to them by a subcommittee of the United States Senate, appointed to investigate the administration of the Federal Internal Security Laws, as to the teachers' past or present membership in the Communist party. All sides concede that, aside from the supposed applicability of section 903, the teachers could not be deprived of their positions, for exercising their Fifth Amendment right (see *Matter of Grae*, 282 N. Y. 428, 434). We turn then to the Charter provision, and we find it clear, concise and complete: "§903. * * * If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

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Section 903 is inapplicable to these appellants in this situation for at least two separate reasons: first, no appellant is an "employee of the city" within the meaning of the law; and, second, the United States Senate group whose questions appellants refused to answer was not authorized to conduct an inquiry into the property, affairs and government of the city or the official conduct of its officers and employees.

First, as to whether these teachers are "employees of the city", section 1 of article XI of our State Constitution makes public education a State function, and the policy of this State for a century "has been to separate public education from all other municipal functions and intrust it to independent corporate agencies", such as boards of education (*Gunnison v. Board of Educ. of City of N. Y.*, 176 N. Y. 11, 23). "The board of education is a corporation separate and distinct from the city of New York" (*Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 208). Matters of appointment of teachers and permanency of their employment have been, by the State Education Law, taken away from the municipalities and given to the education boards (*Matter of Emerson v. Buck*, 230 N. Y., 380, 385). The grants of authority to the boards to administer public education within New York City are exclusive, and negative any authority in the city itself to exercise like powers (*People ex rel. Wells & Newton Co. v. Craig*, 232 N. Y. 125, 135). The long struggle between the Buffalo board of education and the City of Buffalo, described in *Matter of Emerson v. Buck* (*supra*), was ended by this court's declaration thirty years ago, in *Matter of Fuhrmann v. Graves* (235 N. Y. 77, 82, 83), that, while the city controls the total amount to be expended for education, it has no control whatever over the manner of its spending (see, also, *Matter of Brennan v. Board of Educ. of City of N. Y.*, 245 N. Y. 8, 14). There followed an impressive train of cases holding that public school teachers, in the cities of the State, were employees, not of those cities but of the

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local boards of education as separate corporate bodies (*Matter of Gelson v. Berry*, 233 App. Div. 20, 21, affd. 257 N. Y. 551; *Matter of Ragsdale v. Board of Educ. of City of N. Y.*, 282 N. Y. 323, 325; *Nelson v. Board of Higher Educ. of City of N. Y.*, 263 App. Div. 144, 148, affd. 288 N. Y. 649).

It is, therefore, indisputable, not only that the State Constitution and judicially declared State policy bar New York City from the role of "employer" of teachers, but, also, that, as between the City of New York and these teachers, there are none of the marks of an employer-employee relationship, since it is not the city, but the separate boards of education, which select and hire the teachers, pay them, control their teaching work, and are empowered to remove them for cause after hearing (see Education Law, §2, subd. 14; and §§2550, 2551, 2573, 3012, 3022, 6206). Statutes and decisions (cited in great numbers in respondent's brief) relating to other than pedagogical matters or pedagogical personnel having nothing to do with the present problem. The question here is as to whether teachers are "employees of the city". Actually, the only ground suggested for an affirmative answer to that question is the definition in section 981-1.0 of the New York City Administrative Code (a statute separate from, but complementary to, the Charter) of "employee" as "any person whose salary in whole or in part is paid out of the city treasury." The salaries of teachers are "paid out of the city treasury" from funds there on deposit to the credit of the board of education, but we refuse to believe that this sixteen-word definition, in a general statute not concerned with education, destroys the whole public policy of this State, worked out in more than a century of struggle, of seeing to it that public school teachers are definitely not employees of the cities of this State. Until now, there has never been a decision of this court holding any teacher to be an "employee" of a city.

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A second, and separate, reason why section 903 has no application to this situation is that this Senate subcommittee was not authorized to, and disclaimed any purpose to, conduct an inquiry into New York City's governmental affairs or the "official conduct" of any "employee" of the city or of the board of education. It may be possible, grammatically, to read the statute's language: "any legislative committee . . . authorized to conduct any hearing or inquiry" as unrelated to the later phrases in the same sentence: "regarding the property, government or affairs of the city . . . or regarding the . . . official conduct of any officer or employee of the city". But that grammatical possibility is a logical impossibility, and the result would be a statutory monstrosity, whereby an upstate town board or a legislative committee from another State could bring about the firing of a New York City employee because the latter refused to answer the questions of the interlopers, about his official conduct. We do not so construe statutes, especially since we know historically (and as respondents themselves tell us) that section 903 was one of the by-products of the "Seabury Investigation" of 1932. It is most unlikely that the New York State Legislative Committee, of which Judge SEABURY was counsel, or the Legislature itself in setting up the Charter Revision Commission in 1934, or the commission in its 1936 recommendation of a new charter for New York City, or the Legislature or the people of the city in voting for it, intended to deal with a situation where a foreign legislative body might question New York City employees about New York City's governmental affairs. What section 903 contemplates is an inquiry by a New York State, or New York City, legislative committee or officer or board or body authorized to investigate the city government. This subcommittee of the United States Senate was not and did not on this occasion claim to be such a committee, officer, board or body.

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What section 903 means is that a city officer or employee must answer the question of a qualified investigating body concerning the city's affairs, or concerning the conduct of city business by the questioned city officer or employee, or by any other city officer or employee, or forfeit his employment. When, in 1949, the Legislature determined (see findings attached to L. 1949, ch. 360) that the Communist party had been infiltrating into public employment in the public schools, it passed the appropriate (Feinberg) Act to deal with that situation (Education Law, §3022). But the 1938 City Charter of New York dealt with something else entirely, that is, with facilitating local and State investigations of New York City affairs. Membership of teachers in the Communist party may, under the Feinberg Law, prove the teacher's unfitness to be a teacher, and Feinberg Law procedures should be used to bring about any removals for that cause. Refusal of a teacher in a properly authorized investigation, to co-operate by answering questions as to membership in subversive organizations may justify dismissal after hearing, under sections 2573 or 6206 of the Education Law, and those procedures are available and lawful.

In each case, the order should be reversed and the petition granted, with costs in all courts.

LEWIS, Ch. J., FROESSEL and VAN VOORHIS, JJ., concur with CONWAY, J., DESMOND, J., dissents in opinion in which DYE and FULD, JJ., concur.

Orders affirmed.

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MEMORANDUM *PER CURIAM* ON MOTION FOR
REARGUMENT OR AMENDMENT OF THE
REMITTITUR.

Motion, insofar as it seeks reargument denied. Motion, insofar as it seeks to amend remittitur, denied, except as to petitioner-appellant Slochower, on the ground that no question under the Federal Constitution was presented by them to the Court of Appeals. Motion by petitioner-appellant Slochower granted to the extent indicated. Return of remittitur requested and when returned it will be amended by adding thereto the following: Questions under the Federal Constitution were presented and passed upon by the Court of Appeals, viz., whether the rights of petitioner-appellant Slochower to due process under the Fourteenth Amendment to the Federal Constitution were violated by the construction and application herein of New York City Charter (§903), in that petitioner-appellant Slochower claims: (1) that the automatic operation of section 903 deprives him of tenure and of a trial to which he was entitled; (2) that the congressional sub-committee was not empowered to consider and specifically stated that its questions would not be directed to official conduct of city employees and that petitioner-appellant Slochower, therefore, could not have known at the time of the inquiry that the questions asked of him and which he refused to answer related to his official conduct, and (3) that at the time of the inquiry, there had been no determination under the Feinberg Law that the Communist Party was a "subversive" organization, so that membership therein would affect a teacher's eligibility and that the retroactive application of that determination is constitutionally prohibited. The Court of Appeals held that petitioner-appellant Slochower was not denied due process under the Fourteenth Amendment [306 N. Y. 532].

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ORDER APPEALED FROM.

In the Matter of the Application of MARY I. DANIMAN, & ors., Appellants; vs. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Respondent, And another proceeding (SHLAKMAN).

BE IT REMEMBERED, that on the 20th day of October in the year of our Lord one thousand nine hundred and fifty-three, MARY I. DANIMAN, & ors., the appellants in these causes, came here unto the Court of Appeals, by Harold I. Cammer, & ors., their attorneys, and filed in the said Court Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the Second Judicial Department, And The Board of Education of the City of New York, the respondent—in said causes, afterwards appeared in said Court of Appeals by Denis M. Hurley, its attorney,

Which said Notices of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard these causes argued by

Mr. Paxton Blair, of counsel for all the appellants except Harry Slochower, and by Mr. Ephraim London, of counsel for the appellant Harry Slochower, and by

Mr. Michael A. Castaldi, of counsel for the respondents, and a brief having been filed on behalf of the *amicus curiae*, and after due deliberation had thereon, did order and adjudge that the orders of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

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THEFORE, it is considered that the said orders be Affirmed, without costs, as aforesaid and hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted unto the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

(s) RAYMOND J. CANNON
Clerk of the Court of Appeals of
the State of New York.

Court of Appeals, Clerk's Office,
Albany, April 22, 1954.